

WAKO MERCHANT BANK (SINGAPORE) LTD

a

v.

LIM LEAN HENG & ORS

HIGH COURT MALAYA, KUALA LUMPUR

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ABDUL AZIZ MOHAMAD J

[ORIGINATING SUMMONS NO: D2-24-355-1998]

30 MAY 2000

EVIDENCE: *Illegally obtained evidence – Admissibility of – Evidence in breach of s. 97 Banking and Financial Institutions Act 1989 – Whether s. 97 deals with admissibility – Whether evidence relevant – Mareva injunction*

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EQUITY: *Equitable remedies and reliefs – Injunction – Mareva Injunction – Clean hands principle – Whether evidence obtained in contravention of a statute tantamounts to coming to court with unclean hands*

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The plaintiff had applied *ex parte* and obtained a Mareva injunction against the 1st, 11th, 12th and 15th defendants' ('the defendants') respective bank accounts. As the *ex parte* injunction was only for a limited period, the plaintiff filed an *inter partes* application for a Mareva injunction on similar terms. Both applications were supported by the affidavits of the plaintiff's private investigator and managing director. By the instant applications, the defendants sought the leave of the court to cross-examine the private investigator and the managing director on their respective affidavits in order to establish that the obtaining of the information relating to the bank accounts was in breach of s. 97 Banking and Financial Institutions Act 1989 ('the Act') and thus the evidence was inadmissible. The defendants also contended that the cross-examination was relevant in eliciting the full circumstances of the evidence being obtained in contravention of the Act in order to make out a case of coming to equity without clean hands.

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Held:

[1] Sections 97 and 99(2) of the Act do not expressly deal with the question of admissibility of any information or documents obtained in contravention of the Act. It was therefore irrelevant for the defendants to elicit evidence to establish that the information obtained in breach of the Act was inadmissible. Moreover, it is a matter of general law that evidence illegally obtained is nonetheless admissible if relevant.

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- a* [2] The plaintiff had come to court for a Mareva injunction with evidence of the existence and particulars of the bank accounts which was admissible in law. It would be unconscionable to bar the plaintiff from the relief sought on the ground of any wrongdoing in obtaining the evidence.
- b* [3] The principle of *clean hands* did not prevail in the circumstances of the instant case. The defendants therefore could not be given leave to cross-examine for the purpose of establishing that the plaintiff had not come to court with clean hands.
- c* [Application of 1st, 11th and 12th defendants dismissed; prayers 3 and 4 of 15th defendant's application dismissed.]

Case(s) referred to:

George Schultz v. Morgan Sash & Door Co (Okla) 344 P2d 253 (*refd*)

Ramli Kechik v. PP [1986] 2 MLJ 33 (*refd*)

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Legislation referred to:

Banking and Financial Institutions Act 1989, ss. 97(1), (3), 99(1), (2), (3), 103

Other source(s) referred to:

GM Row's Law of Injunctions, 1985, 6th edn, vol 1

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Nelson's Law of Injunctions, 1992, 3rd edn

For the plaintiff - Ong Chee Kwan (Brenda Chong Chooi Har with him); M/s Lee Ong & Kandiah

For the 1st defendant - Gopal Sreenevasan (Charmaine Chow with him); M/s Sivananthan

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For the 11th & 12th defendants - S Suhendran; M/s Saheeran Woon N Navaratnam

For the 15th defendant - Ranjit Singh (Tan Yee Boon with him); M/s Ranjit Ooi & Robert Low

Reported by Izzaty Izzuddin

JUDGMENT

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Abdul Aziz Mohamad J:

- h* The first defendant is indebted to the plaintiffs under a judgment obtained in the Republic of Singapore which has been registered as a judgment of the High Court in Malaya under the Reciprocal Enforcement of Judgments Act 1958. Believing that the first defendant would dissipate his assets in Malaysia in order to avoid execution to satisfy the judgment, the plaintiffs applied for *ex parte* and obtained a Mareva injunction. Since under our Rules an injunction obtained *ex parte* would be of a limited duration only,
- i* the plaintiffs also filed an *inter partes* application for a Mareva injunction in similar terms. The application is yet to be heard.

Among the assets affected by the *ex parte* Mareva injunction are several bank accounts, two in the name of the first defendant, two in the name of the eleventh defendant company, one in the name of the twelfth defendant company, and four in the name of the fifteenth defendant, who is the first defendant's wife. Those bank accounts are also among the assets that are the subject matter of the *inter partes* application.

The existence and details of those bank accounts were discovered by a private investigator engaged by the plaintiffs. His affidavit went in support of the plaintiffs' *ex parte* application. The plaintiffs' managing director also affirmed an affidavit in support of the *ex parte* application. For the existence and particulars of the bank accounts, he relied on the discovery made by the private investigator. The same affidavits of the private investigator and the managing director also go in support of the *inter partes* application.

It is the plaintiffs' case that the first defendant is the beneficial owner of the bank accounts in the names of the two companies and the first defendant's wife, and that the companies and the wife are merely the nominees of the first defendant.

By the present applications, the first defendant (encl. (89)), the eleventh and twelfth defendants (encl. (109)) and the fifteenth defendant (encl. (57)) seek leave to cross-examine the private investigator and the managing director on their affidavits in order to establish, firstly, that in the obtaining of the information relating to the bank accounts there has been a breach of s. 97 of the Banking and Financial Institutions Act 1989. Those defendants contend that the first purpose of the cross-examination is relevant to the *ex parte* application and the *inter partes* application because if there has been a breach of s. 97, the information is inadmissible and consequently those bank accounts should not have been subjected to the *ex parte* injunction and should not be included in the *inter partes* application. Secondly, and what is more important, those defendants hope from the cross-examination to elicit the full circumstances of the obtaining of the information in contravention of s. 97 in order to make out a case of coming to equity for the Mareva injunction without clean hands and without disclosing those circumstances. They argue that the plaintiffs, coming to equity without clean hands and with failure to make material disclosures, should have failed entirely in their *ex parte* application and should fail entirely in their *inter partes* application.

I do not think the question of disclosure need be treated as a separate question from the clean-hand principle, because if the defendants succeed on the argument about clean hands, they need not rely on the non-disclosure, and if they fail on the argument about clean hands they cannot succeed on the non-disclosure.

- a* So in these applications I need to decide only two questions of law. The first is whether evidence obtained in contravention of s. 97 is admissible. The second is whether the clean-hand principle applies in the circumstances of this case.

b **Section 97**

- c* Subsection (1), read with s. 103, makes it an offence to disclose to any person any information or document relating to the affairs or account of a customer of a financial institution, which includes a bank. The persons liable for the offence are a director and an officer of the licensed institution, and any person who has access to any document or material relating to the affairs or account of the customer. Subsection (3), read with s. 103, makes it an offence to make further or onward disclosure of any information or document disclosed in contravention of sub-s. (1). The person liable for the offence is a person who has the information or document and knows that it has been disclosed in contravention of sub-s. (1). The private investigator in this case, in disclosing in his affidavit the information about the bank accounts, risked committing an offence under sub-s. (3) if to his knowledge the information had originally been disclosed in contravention of sub-s. (1).

- e* Sub-section (1) of s. 99 lays down certain exceptions. The effect of the exceptions is that a disclosure falling within the exceptions is not an offence under s. 97. Exception (a) is where the customer has in writing permitted the disclosure. Exception (d) is for disclosure in certain civil proceedings, which do not include the Mareva injunction applications in this case.

- f* It is obvious that the intention of Parliament in enacting s. 97 is to protect the secrecy of the affairs and account of a customer of a financial institution as such a customer, but, in giving effect to that intention, Parliament has gone only to the extent of creating offences of the prohibited disclosures. Parliament has not gone further to deal with the question of the admissibility or otherwise in criminal or civil proceedings of any information or document disclosed in contravention of s. 97, which is a matter of the law of evidence, where the law is that evidence illegally obtained is nonetheless admissible if relevant. See *Ramli bin Kechik v. Public Prosecutor* [1986] 2 MLJ 33 at p. 38 F left.

- g* In sub-ss. (2) and (3) of s. 99 there is an indication of the depth of Parliament's concern to protect the secrecy of a customer's affairs and account. Sub-section (2) allows to be held in camera civil proceedings in which, by virtue of sub-s. (1), it will not be an offence to disclose any
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protected information or document, and, read with s. 103, makes it an offence, if the proceedings are held in camera, for any party to the proceedings to disclose to any other person any information or document disclosed in the proceedings. Sub-section (3), read with sub-s. 103, makes it an offence for any person to publish the identity of “any parties to such civil proceedings as are referred to in sub-s. (2)”. But as I said, Parliament has not gone so far as to deal with the admissibility of any information or document criminally disclosed under s. 97 or s. 99(2).

In contending that information or a document that is illegally disclosed in contravention of s. 97 or 99(2) is inadmissible despite the general law that evidence illegally obtained is nonetheless admissible if relevant, the defendants’ counsel relied on several arguments. One argument is that those sections constitute an express provision against admissibility. As I have been at pains to show, the sections do not deal with the question of admissibility in evidence of any information or document that is disclosed in contravention of the sections. Another argument is that with the existence of exception (d) in s. 99(1) for disclosures in the course of certain types of civil proceedings, it is only in such civil proceedings that the information or document disclosed is admissible, and the Mareva injunction applications in this case are not one of those proceedings. Again, as I have tried to show, the exceptions do not concern the question of admissibility. The effect of the exceptions is that a disclosure which would otherwise be an offence would not be an offence if it falls under any one of the exceptions. They are exceptions to criminal liability. It will not be an offence, to make disclosure in the course of such civil proceedings. It will be an offence to do so in other civil proceedings. But if the person concerned is prepared to face the criminal consequences of disclosure – for which, if and when the facts are known, he might be dealt with, not in the civil proceedings, but subsequently in the criminal court – there is no reason why the information or document disclosed in evidence should not be admitted. Another argument is that to admit the evidence would be to countenance the commission of an offence under those sections, which cannot be the policy of the court. The answer to that argument is twofold. Firstly, the suggestion of countenancing the commission of an offence is not true. The admission of the evidence disclosed does not affect the discloser’s liability to prosecution if the disclosure is an offence, for which he will be dealt with as the circumstances warrant. Secondly, the argument could as well be applied to the general law that evidence illegally obtained is nonetheless admissible. To allow the argument is to deny the general law and render inadmissible evidence illegally obtained on the ground that by admitting such evidence the courts are countenancing the illegality.

- a* The defendants have failed to present any convincing argument against the application of the general law to a disclosure in evidence in contravention of s. 97 of information or document relating to the affairs or account of a customer of a financial institution. For my part, the general law being such, it will require an express enactment of Parliament to render inadmissible the evidence so disclosed.
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It will therefore be irrelevant to elicit evidence to show that the existence and particulars of the aforesaid bank accounts are inadmissible and the defendant cannot be given leave to cross-examine the private investigator and the managing director for that purpose.

- c*
- The Clean-hand Principle***

- d* It must be appreciated that the substantive litigation between the plaintiffs and the first defendant is over and done with. The plaintiffs have obtained judgment against the first defendant, and are now endeavouring to recover the judgment debt. They need a Mareva injunction to freeze or preserve the assets of the first defendant so that they will be available for satisfying the judgment by some means or other. A Mareva injunction is an equitable relief but it is not an injunction to preserve the *status quo* of the subject matter of litigation. It is an aid to execution, and in this case the plaintiffs
- e* need not show a good arguable case because they have already shown that by obtaining judgment. They only have to show a risk of dissipation by the first defendant of his assets and that the assets that they want preserved are his assets. Among the assets are the bank accounts, some of which are
- f* in the name of the first defendant and some in the names of the eleventh, twelfth and fifteen defendants, which the plaintiffs claim are actually the first defendant's assets. It is in the obtaining of the particulars of the bank accounts that those defendants hope to show by cross-examination that the plaintiffs have made their hands unclean, not in the obtaining of evidence on which they rely to show that the accounts that are not in the first
- g* defendant's name are in fact held for him or to show the risk of dissipation. As to the particulars of the bank accounts, I think it is important to note that no matter how the private investigator had obtained them, they are true. So the plaintiffs have come to equity for a Mareva injunction with the truth, as far as those particulars are concerned, but those
- h* defendants want to show that the plaintiffs have obtained the truth with unclean hands and therefore the doors of equity should be shut against them. That is the situation against which the application of the clean-hand principle requires to be considered in this case.

- i* For authority on the clean-hand principle or maxim, both sides rely merely on passages from *Nelson's Law of Injunctions*, 3rd edn, 1992, and *G.M Row's Law of Injunctions*, 6th edn, 1985, vol. 1, without examining or

producing the cases on which statements in those passages are founded, except *George Schultz v. Morgan Sash & Door Company (Okla)* 344 P2d 253, 74 ALR 2d 967, which was forwarded to me after the close of submission. I do not find in those passages or in related passages or in *George Schultz* an example of a situation in which the application of the principle is called for or is rejected, that is comparable in type to the situation that obtains in this case.

The defendants rely on the following passage at pp. 279 and 280 of Row's:

"The jurisdiction of the court to interfere by way of interlocutory injunction in support of a legal title being purely equitable, it is governed by strict equitable principles. The court, where its summary interference is invoked always looks to the conduct of the party who makes the application, and will refuse to interfere, even in cases where it acknowledges a right, unless his conduct in the matter has been fair and honest, and free from any taint of fraud or illegality." The court should consider all relevant matters before passing an interim order. One of them and one which is quite important is whether the plaintiff has been honest. If he comes to the court with a very material averment which turns out to be false, the court will be slow in the exercise of its power to grant injunction in favour of such a person. It is the duty of the court to take into consideration the conduct and situation of the parties in determining whether the relief asked by way of injunction should be given. Plaintiff must show that he is equitably and in good conscience entitled to the relief by injunction in addition to showing equitable grounds for relief and where the established facts do not show any superior equity entitling the complainant to injunction asked as against the defendant, it should not be granted.

Even if there is a *prima facie* case, and a case of irreparable injury and balance of convenience is made out in favour of the plaintiff, the conduct of the plaintiff is an important factor that should be kept in view.

Reading the passage as a whole, I get the impression that the statements in the passage are derived from the context of interlocutory injunctions by way of a temporary relief or solution to the essential or substantive dispute between the parties pending a full determination of the dispute, so that the conduct required of the plaintiffs, even though it be conduct in the making of the application for the injunction, may be thought to be conduct that has a bearing on the essential or substantive dispute. I do not think any of the statements is derived from the context of an application for a Mareva injunction.

The plaintiffs, for their part, rely on passages from the same two books that provide indications of limitations to the principle or maxim. One passage is the following at p. 284 of Row's:

a The want of equity that will bar a right to equitable relief for coming into court with unclean hands must be so directly connected with the matter in litigation that it has affected the equitable relations of the parties arising out of the transaction in question. "The wrong of a plaintiff which must be invoked to defeat his claim to equitable relief must have a direct and necessary relation to the equity for the enforcement of which he prays."

b The other is the following at pp. 113 and 114 of *Nelson's*, which is based on *George Schultz*:

c "The maxim that one who comes into equity must come with clean hands ... is confined to misconduct in regard to or at all events in connection with, the matter in litigation, so that it in same (*sic*) ways affects the equitable relations subsisting between the two parties and arising out of the same transactions." "Clean hands" means a clean record with respect to a transaction between the parties, and not with respect to any third party.

d The prominent lesson from those two passages is that the clean hands with which one needs to come to equity is not clean hands in all respects but clean hands in connection with "the matter in litigation". I think the "matter in litigation" there is the essential dispute between the parties and not the application for the equitable relief *per se*. If the equitable relief is an injunction, the matter in litigation is the dispute that requires an injunction

e to provide temporary relief pending full resolution of the dispute. Just as the case is with the passage relied on by the defendants, the passages relied on by the plaintiffs seem also to be from the context of an equitable relief connected with the resolution of the essential dispute. Those passages are not derived from Mareva injunction situations. In a Mareva injunction

f situation, there is no "matter in litigation" within the meaning and intent of those passages. I think learned counsel for the plaintiffs would be right in saying that the matter in litigation in this case is the litigation in Singapore, if those passages envisage a Mareva injunction situation. He argues that the principle of clean hands does not apply to the applications for a Mareva

g injunction in this case because even if it be shown that the plaintiffs have not come with clean hands as regards the evidence of the bank accounts, the want of clean hands is not connected with the dispute in Singapore and is not relevant. But as I said, the passages do not have a Mareva injunction in mind and it would be wrong to make use of the passages to produce the result that one need not come with clean hands for a Mareva

h injunction.

A Mareva injunction being an equitable relief, the maxim about clean hands must apply to the applicant for the injunction. The problem in this case is to decide whether the circumstances that I have set out merit the

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application of the principle. The passages relied on by the plaintiffs clearly show that there are limitations to the maxim. Unfortunately they are of no help in determining whether the circumstances in this case call for the application or limitation of the maxim. *a*

I think there can be no hard and fast rules. Equitable principles, by their very nature of being based on conscience, cannot be rigid in their application. In the end one must be guided by conscience and a sense of fairness. *b*

The plaintiffs have come to court for a Mareva injunction with evidence that is admissible in law of the existence and particulars of the bank accounts and that is true, notwithstanding that it may be an offence against s. 97 to have obtained or disclosed it and notwithstanding that those sections are aimed at protecting the secrecy of those accounts. I think it would be unconscionable to bar the plaintiffs from the relief sought on the ground of any wrongdoing in the obtaining of the evidence. The facts and truth about those accounts were there, and it was only a matter of uncovering the truth. It would be unconscionable to allow the defendants to defeat the plaintiffs' application on the ground that they had obtained the truth by – assuming such to be the case – foul means. Truth is supreme and must prevail. I rule that the principle of clean hands does not prevail in the circumstances of this case. The principle is irrelevant and the defendants cannot be given leave to cross-examine the private investigator and the managing director for the purpose of showing that the plaintiffs have not come to court with clean hands. *d*
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I dismiss with costs the applications of the first, eleventh and twelfth defendants (encls. (89) and (109)) and prayers 3 and 4 of the application of the fifteenth defendant (encl. (57)). *f*

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